UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers, *et al*. and CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA / NNOC) and UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	08-CA-117890, *et al*.

RESPONDENT HOSPITAL OF BARSTOW, INC. D/B/A BARSTOW COMMUNITY HOSPITAL'S REPLY TO GENERAL COUNSEL'S SUBSTANTIVE OPPOSITION AND CHARGING PARTY'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, ALTERNATIVELY, MOTION TO DISMISS PARAGRAPH (54) OF THE SECOND AMENDED COMPLAINT

As a Respondent in the above-captioned cases, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital (hereafter, "Barstow" or the "Hospital") hereby replies, by and through the Undersigned Counsel, to the substantive Opposition submitted by the General Counsel, as well as the Opposition submitted by the Charging Party, in connection with Barstow's

Motion for Summary Judgment, Alternatively, Motion to Dismiss Paragraph (54) of the Second Amended Complaint (hereafter, the "Motion").[1]

ARGUMENT

1.) Re-Litigation of the Good Faith Underlying Barstow's Assertion of the Agreement

The General Counsel argues that, while the Board previously determined that Barstow's assertion of the Agreement as an affirmative defense was not frivolous, the Board has never determined whether Barstow's assertion of the Agreement as a cause of action violated Section 8(a)(1) of the Act, which would require the Board to apply a different legal standard. See Tr. 2906-2907. As noted by the Motion, in order to show a violation of Section 8(a)(1), the General Counsel is required to establish that "no reasonable litigant could realistically expect success on the merits." See Motion, page 9. Thus, as part of the case now before Your Honor, the General Counsel is required to show that no reasonable party could foresee any success in terms of Barstow's factual position that the Union agreed to arbitrate disputes that arose during the course of the parties' negotiations and

[1] Barstow has used below the same short-hand references employed by the Motion. By way of example, Barstow has used "Agreement" to refer to the agreement that Barstow believes was reached between the Hospital and the Union to arbitrate any disputes that arose during the course of their negotiations toward a collective bargaining agreement.

Barstow's legal position that the agreement could be enforced under Section 301 of the LMRA.

Notably, the General Counsel and the Union did not undertake any effort to explain how the standard that the Board would apply to the allegations set forth by Paragraph (54) of the Complaint differs, legally or practically, from the standard the Board previously applied as part of the rejection of the Union's request for litigation expenses. In fact, the General Counsel and the Union do not even identify the standard that the Board used, if only implicitly, as part of the previous case. In any event, though the authority of the Board to award litigation expenses remains a subject of controversy[2], the standard the Board will apply to a request for litigation expenses remains clear.

In Unbelievable, Inc. d/b/a Frontier Hotel & Casino, the Board encountered an allegation that the employer had raised frivolous defenses, and therefore, should reimburse the other parties' litigation expenses. 318 NLRB 857 (1995), enf. denied in part *sub nom* Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997). The Board reviewed previous cases in which the Board had ruled on a party's request for reimbursement of litigation expenses and re-affirmed that, so long as the affirmative defense is

[2] See HTH Corp. v. NLRB, 823 F.3d 668, 679 (D.C. Cir. 2016) (Board lacks the inherent authority to award litigation expenses).

"debatable" as opposed to "frivolous," the defense may not serve as a basis for the award of any litigation expenses. 318 NLRB at 860; see also Whitesell Corp., 357 NLRB 1119, 1185 (2011). The Board explained that, by way of example, a defense should be deemed debatable to the extent the defense turns on issues of credibility or some of the General Counsel's allegations have been dismissed. Id. In the end, however, the Board made clear that "[e]ach allegation of a frivolously maintained defense must be evaluated in its particular context." Id., at 861.

In Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB No. 34 (2014), (hereafter the "Decision"), the Board did not share any particular rationale for the rejection of the Union's request for litigation expenses. Equally true, however, the Board did not provide any indication that the Board had evaluated the Union's request by the application of any novel standard. Your Honor has every reason to believe, therefore, that the Union's allegation that Barstow had averred a frivolous defense was evaluated in the context of the arguments pressed by the Union, together with the other circumstances that came together to comprise the dispute before the Board. Unbelievable, 318 NLRB at 861. In terms of the Union's arguments, although the Union made the sweeping claim that all of Barstow's affirmative defenses were frivolous, the only defense that was the

subject of any substantive challenge by the Union was Barstow's position that, under the Agreement, the Union was obligated to arbitrate the disputes that were before Judge Pollack. See Motion, Exhibit G, pages 6-7, 11-12. In essence, the Union argued that Barstow lacked any factual basis for the position that the Union agreed to arbitrate the parties' disputes, insofar as the Hospital "presented no witness or evidence of any kind in support of the [defense]." Id., page 6. The Union also reviewed other cases in which the party, whether Barstow or another entity, alleged the Union had agreed to arbitrate disputes related to negotiations and urged the Board to infer that the rejection of these allegations showed that Barstow's defense was staked to a "meritless theory." Id., at page 7.[3]

Taken in context, the Decision shows that, in spite of the Union's arguments to the contrary, the Board concluded that Barstow had a reasonable basis to allege the parties agreed to arbitrate the disputes that were before Judge Pollack and the Hospital had a reasonable basis to believe

[3] The General Counsel has no basis to argue that Barstow's legal theory was objectively unreasonable because an oral agreement to arbitrate is not enforceable under the Federal Arbitration Act. See Tr. 2906. In the Decision, though Member Johnson espoused the view that the Agreement was unenforceable under the FAA, the two-Member majority rejected Barstow's defense on entirely unrelated grounds. Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB 34, at *1, fn. 3. Similarly, Judge Snyder determined that the FAA did not apply and an oral agreement to arbitrate could be enforced under the LMRA, which was the express basis for the Hospital's proceeding. See Motion, Exhibit C, page 7, fn. 3.

that, as a matter of law, the agreement could be enforced. In a word, the Board viewed Barstow's position that the Hospital and the Union were parties to an enforceable agreement to arbitrate their disputes as "**debatable**."[4]

Significantly, the General Counsel and the Union do not argue that any substantive difference exists between the defense that Barstow raised before the Board and the claim that Barstow hoped to prosecute before Judge Snyder. Put a different way, the evaluation of Barstow's cause of action and the evaluation of Barstow's defense is, in fact, the evaluation of the same position. The ability of the General Counsel to compel Barstow to defend, again, the good faith underlying the Hospital's position presumes that, even though the Board viewed the existence of an enforceable agreement to arbitrate as debatable, a possibility remains that, somehow, the Board may conclude that no reasonable party could realistically expect to prevail in connection with any prosecution of the position. The General

[4] The Board has explained that the dismissal of one or more of the General Counsel's allegations may lead the Board to view a party's defense as debatable. See Unbelievable, 318 NLRB at 860. In the case here, the Board clearly could not have taken such an approach, as the Board upheld the entirety of the General Counsel's allegations. Additionally, the fact that Barstow had no history of any violations of the Act would carry no relevance to the Board's assessment of whether litigation expenses should be awarded. Id., page 861, fn. 12. Unmistakably, in line with the arguments advanced by the Union, the Board's determination was focused upon the basis, factually and legally, for the Hospital's assertion of the Agreement.

Counsel observed that the Motion should be denied to the extent the General Counsel "can prove any set of facts" that would carry the day (see Tr. 2905), but never ventured beyond the boilerplate phraseology to identify any facts that might take the General Counsel's legal theory a step outside of the expansive shadow of the Board's previous determination that Barstow's position was debatable, not frivolous. The simple fact of the matter is that, as a matter of the agency's own record, Barstow had a good faith basis for the assertion of the Agreement, and though the General Counsel appears eager to yank the Hospital to the gallows once more, the General Counsel has not endeavored to explain how the Hospital's position could be, at once, debatable and objectively unreasonable.

2.) Reasonable Basis

The Complaint alleges that Barstow's proceeding against the Union was baseless because the Hospital's pleadings simply did not allege the existence of any agreement between the Hospital and the Union to arbitrate disputes that arose at the bargaining table. See Complaint, ¶ 54(D). As part of the hearing before Your Honor, the General Counsel described the allegation in substantially the same way. To quote, the General Counsel alleges the proceeding was baseless "**because it was based on the underlying claim that the Union breached a contractual agreement to**

arbitrate all disputes regarding the collective bargaining process" and "**[Barstow] was unsuccessful in three successive complaints in actually alleging the existence of the terms of any relevant agreement**." See Tr. 2905 – 2906 (emphasis added). Put simply, the General Counsel believes that, because Barstow's proceeding was not successful, the proceeding was not supported by any reasonable basis, which is precisely the type of logic previously rejected by the U.S. Supreme Court. See Allied Mechanical Services, Inc., 357 NLRB 1223, 1228-1229, reviewing BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002).

Moreover, both the General Counsel and the Union failed to address any of the paragraphs of the FAC and the SAC that were highlighted by the Motion as clear-cut evidence that Barstow did allege the existence of the Agreement. See Motion, page 14. Likewise, the General Counsel and the Union do not contend that Judge Snyder dismissed the FAC and the SAC because Barstow did not plead the "existence" of the Agreement. Instead, as noted before (see Motion, pages 14-15), the Judge concluded that the facts alleged by the Hospital would not rise to the level of a general agreement to arbitrate any and all disputes that arose during the course of the parties' negotiations.

In summary, the General Counsel and the Union have not shown any need for a hearing related to the allegations set forth by Paragraph (54) of the Complaint. The pleadings that Barstow filed with the Court clearly show the Hospital alleged the "existence" of the Agreement and the argument advanced by the General Counsel during the hearing before Your Honor reveals that the General Counsel has conflated, and thus confused, Barstow's lack of litigation success with the lack of a reasonable basis for the proceeding.

3.) Retaliatory Motive

Predictably, the Union has put before Your Honor the very same diversionary argument used during the course of the proceedings before Judge Snyder. See Motion, pages 15-16. The Union argues, with the General Counsel in tow, that Barstow's proceeding was designed to deprive the Union of any and all rights to file unfair labor practices with the Board. Although the Hospital did allege that the Union breached the Agreement by taking the parties' dispute solely to the Board *via* unfair labor practice charges, the Union and the General Counsel do not reference, because they cannot reference, any component of the Hospital's Prayer for Relief that seeks to compel the Union to withdraw any unfair labor practice charge pending before the agency, let alone enjoin the Union from the filing of any

future unfair labor practice charges. Your Honor should not countenance these attempts by the Union, and now the General Counsel, to engage in *post hoc* revisions to the remedies that Barstow had hoped to obtain through the proceedings before Judge Snyder.

CONCLUSION

For all the reasons set forth above, Barstow respectfully requests that Your Honor enter summary judgment in favor of Barstow as to the allegation set forth by Paragraph (54) of the Complaint, or alternatively, dismiss the allegations.

Dated: Glastonbury, CT
November 23, 2016

Respectfully submitted,

/s/_____

Bryan T. Carmody, Esq.
Carmody & Carmody, LLP
Attorneys for Hospital of Barstow, Inc. d/b/a
Barstow Community Hospital
134 Evergreen Lane
Glastonbury, CT 06033
(203) 249-9287
bryancarmody@bellsouth.net

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DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers, *et al*. and CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA / NNOC) and UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	08-CA-117890, *et al*.

CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on November 23, 2016, the document above was served upon the following *via* email:

Aaron Sukert, Esq.
Stephen Pincus, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 8
1695 AJC Federal Office Building
1240 East Ninth Street
Cleveland, OH 44199

Aaron.Sukert@nlrb.gov
Stephen.Pincus@nlrb.gov

Carlos Gonzalez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 31
11150 West Olympic Blvd., Suite 700
Los Angeles, CA 90064-1825
Carlos.Gonzalez@nlrb.gov

Leonard Sachs, Esq.
Counsel for Respondent Community Health Systems, Inc.
Howard & Howard
211 Fulton Street, Suite 600
Peoria, IL 61602
LSachs@HowardandHoward.com

Tracy Litzinger, Esq.
Counsel for Respondent Community Health Systems, Inc.
Howard & Howard
211 Fulton Street, Suite 600
Peoria, IL 61602
TLitzinger@HowardandHoward.com

Robert Hudson, Esq.
Counsel for Respondent CHSPSC, LLC
Frost Brown Nixon
7310 Turfway Road, Suite 210
Florence, KY 41042
rhudson@fbtlaw.com

Nicole Daro, Esq.
Counsel for Charging Party California Nurses Association
2000 Franklin Street
Oakland, CA 94612
NDaro@CalNurses.Org

Dated: Glastonbury, CT
November 23, 2016

Respectfully submitted,

/s/_____

Bryan T. Carmody, Esq.
Carmody & Carmody, LLP
Attorneys for Hospital of Barstow, Inc. d/b/a
Barstow Community Hospital
134 Evergreen Lane
Glastonbury, CT 06033
(203) 249-9287
bryancarmody@bellsouth.net